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No. PD-0804-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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Ex Parte Samuel Osvaldo Garcia, Appellee

Appeal from Cameron County

APPELLEE'S RESPONSE TO STATE'S BRIEF ON THE MERITS

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Ex Parte Osvaldo Garcia, Appellee

Appeal from Cameron County

APPELLEE'S RESPONSE TO STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This Court granted the State's Petition for Discretionary Review to determine whether a claim that counsel affirmatively misadvised a defendant about the deportation consequences associated with a guilty plea is cognizable on habeas despite *Ex Parte De Los Reyes'* holding that *Padilla* (duty to advise) does not apply retroactively on habeas.[1]

[1] This Court granted the State's Petition for Discretionary Review only on Ground Number 1. Ground Number 2 which is the State's issue regarding Laches was not addressed in the State's Brief on the Merits. As such, Appellee's Response to State's Brief on the Merits is only responsive to Issue Number 1. If this Court revisits the Laches argument made by the State, Appellee would like the opportunity to respond to same in a separate filing.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument, and this Court did not grant it. However, Appellee respectfully requests oral argument.

SUMMARY OF THE ARGUMENT

A defendant's claim that he was affirmatively misadvised regarding the deportation consequences of a guilty plea is cognizable notwithstanding *Ex parte De Los Reyes'* holding that *Padilla* does not apply retroactively. *Ex parte De Los Reyes* only cemented the holding of *Chaidez*, as it applies to Texas law, such that ineffective assistance claims based on a *failure to advise*, before the decision in *Padilla*, are not cognizable. As such, *Ex parte De Los Reyes'* holding is entirely inconsequential to Appellee's claim herein, that his counsel's affirmative misadvice regarding immigration consequences, constitutes ineffective assistance of counsel. This is because Appellee's claim that defense counsel's performance constitutes ineffective assistance of counsel should be analyzed under the two-prong framework provided by *Strickland v. Washington.*

This Court's September 20th decision in *Ex parte Aguilar* did not announce a "new rule of law." ___ S.W.3d ___, No. WR-82-014-01, 2017 Tex. Crim App. LEXIS 894 (2017). Instead, *Ex parte Aguilar* simply extended *Padilla* to situations which result in a loss of legal status (instead of immediate deportation as in *Padilla*) and possible later removal. *Ex parte Aguilar* did not differentiate between

affirmative misadvice and non-advice, as affirmative misadvice claims existed prior to the holdings in *Padilla* and *Aguilar* and were analyzed under the *Strickland* framework. As such, Appellee's claim for ineffective assistance of counsel based on affirmative misadvice is cognizable in spite of *Ex parte De Los Reyes*. The State's argument that Appellee's claim is not cognizable based on the assumption that deportation consequences were collateral consequences of a guilty plea is unfounded given federal and Texas jurisprudence as it pertains to vacating convictions on the basis of the age-old principle that a lawyer may not affirmatively mislead a client.

Although this Court had affirmatively held that admonishments about deportation consequences were not constitutionally required in *Carranza* and *Jimenez,* this Court never held that affirmative misadvice regarding deportation was not a ground for ineffective assistance of counsel as it was on affirmative misadvice cases concerning parole eligibility, and federal/state sentence service.

ARGUMENT & AUTHORITIES

I. *EX PARTE DE LOS REYES'* HOLDING THAT *PADILLA* DOES NOT APPLY RETROACTIVELY IS INCONSEQUENTIAL TO APPELLEE'S CLAIM

This Court has not previously ruled directly on the issue of whether affirmative misadvice claims related to immigration consequences in Texas are barred by the non-retroactivity accorded to a no advice claim, as in *Ex parte De Los*

Reyes. At the time of the decision in *Ex parte Aguilar,* this Court was aware of the decision in *Ex parte De Los Reyes* regarding non-advice and the fact that claims for non-advice were non-retroactive given the ruling in *Chaidez. Ex parte De Los Reyes* only served to cement the holding of *Chaidez* for purposes of Texas law. *Aguilar,* on the other hand, only served to extend *Padilla* to situations for loss of status. As such, *Ex parte Aguilar* and *Ex parte De Los Reyes,* are inconsequential as neither case falls within the ambit of Appellee's claims. Instead, the case of *Strickland v. Washington* governs Appellee's claim.

a. <u>Affirmative Misadvice Claims Regarding Immigration Consequences Such as Appellee's Were Cognizable Pre-*Padilla* and Remain as Such In Spite of Holding in *Ex parte Aguilar*</u>

i. Affirmative Misadvice Regarding Immigration Consequences Prior to Padilla

In 2010, *Padilla v. Kentucky*, 130 S. Ct. 1473 (U.S. 2010), held that trial counsel must inform their clients of the possible immigration consequences of pleading guilty. Then, in 2013 the case of *Chaidez v. United States,* 133 S. Ct. 1103 (2013), held that "…defendants whose final convictions became final prior to *Padilla…*cannot benefit from the holding of *Padilla." Id.* at 1113.

*Padilla'*s requirement that an effective counsel advise his client as to immigration consequences of a guilty plea is a broad, new rule that encompassed an already existing rule that a defense attorney renders ineffective assistance if she affirmatively misadvises a client as to immigration consequences.

Justice Alito's concurrence in *Padilla* supports a reading that affirmative misadvice was an older and narrower rule than no advice. First, he recognized that "reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar." *Padilla*, 559 U.S. at 385, 130 S.Ct. 1473 (J. Alito, concurring). Second, Justice Alito observed that at least three federal circuit courts, including the Fifth Circuit, had held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances. *Id.* at 386, 130 S.Ct. 1473; *cf. Rosa v. State*, No. 05-04-00558-CR, 2005 WL 2038175, at *3–4 (Tex. App.—Dallas Aug. 25, 2005, pet. ref'd) (concluding that a plea counsel was ineffective for misadvising a client that a plea of guilty on a charge of "family violence" was not a "deportable" offense when it was in fact and reversing the denial of a motion for new trial as to that offense). Third, he noted that "no [federal] court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance." *Id.* (emphasis in original).

The Solicitor General in Padilla argued that "[t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have drawn . . . [a] distinction [] between defense counsel who remain silent and defense counsel who give affirmative misadvice." Br. for the United States as Amicus Curiae

Supporting Affirmance, *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), 2009 WL 2509223, at *8; see also *Mora-Gomez*, 875 F. Supp. at 1212 (noting that, "among the courts that have decided the question [of whether misadvice as to immigration matters is subject to Strickland], the clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance").

Chaidez later made clear that individuals like Appellee can bring ineffective assistance claims on the bases of affirmative misadvise:

> "…true enough, three federal circuits (and a handful of state courts) held before *Padilla* that misstatement about deportation could support an ineffective assistance claim. But those decisions reasoned only that a lawyer may not affirmatively misrepresent his expertise or otherwise actively mislead his client on any important matter, however related to a criminal prosecution. *See, e.g., United States v. Kwan*, 407 F.3d 1005, 1015-1017 (C.A.9 2005). They co-existed happily with precedent, from the same jurisdictions (and almost all others), holding that deportation is not "so unique as to warrant an exception to the general rule that a defendant need not be advised of the collateral consequences of a guilty plea." *See United States v. Campbell*, 778 F.2d 764, 769 (C.A.11 1985).

So at most, *Chaidez* has shown that a minority of courts recognized a separate rule for material representations, regardless whether they concerned deportation or another collateral matter. *Chaidez*, 133 S. Ct. at 1105. The Court noted that a lawyer may not "[a]ctively mislead his client on any important matter, however related to a criminal prosecution," or his or her representation falls short of Sixth Amendment standards. *Id.* Courts have long recognized that the Sixth Amendment requires

lawyers to be truthful in all matters that would be material to a defendant's decision to plead guilty or go to trial. *See,* e.g., *U.S. v. Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 187-88 (2nd Cir. 2002).

As such, *Chaidez* left open the possibility of ineffective assistance claims based on affirmative misadvise of former counsel. *Chaidez* established that claims based on misstatements about deportation are sufficient to support a claim for ineffective assistance of counsel under the Sixth Amendment of the United States Constitution.

The most recent circuit court opinion that closely reads *Padilla* and *Chaidez* is *United States v. Castro–Taveras.* 841 F.3d 34 (1st Cir. 2016). In it, the applicant appealed the denial of *coram nobis* relief, which he sought on the basis that his criminal defense counsel was ineffective for misadvising him on the immigration consequences of pleading guilty to insurance and mail fraud. *Id.* at 36. The federal appellate court recognized that in *Padilla*, the Supreme Court held that an attorney's incorrect advice or failure to advise on the deportation consequences of a criminal conviction provides a basis for an ineffective assistance of counsel claim. *Id.* at 38. It also recognized that *Chaidez* decided that *Padilla* announced a new rule at least as to failure-to-advise claims concerning immigration matters. *Id.*

The *Castro–Taveras* Court reconciled *Teague*, *Padilla*, and *Chaidez* in light of a subtle and confounding distinction in *Padilla*: The applicant in *Padilla* alleged misadvice, according to the Supreme Court's opinion, but the rule announced by the majority was to "failure-to-advise" situations. *Castro–Taveras*, 841 F.3d at 38. In analyzing *Padilla* and *Chaidez*, the *Castro–Taveras* Court observed,

> *"We do not go so far as to say, however, that Padilla and Chaidez have to be read as affirmatively excluding misrepresentation claims from the scope of the new rule..." Id.*

Certain language in *Chaidez*, however, as well as the absence of any acknowledgment in *Padilla* that misadvice claims had been subject to *Strickland* theretofore in the lower courts, precludes us from construing the two decisions as affirmatively excluding misadvice claims from the scope of the new rule. *Castro–Taveras*, 841 F.3d at 45–46 (internal citations omitted). In conducting the *Teague* analysis, the court wrote:

> [T]he legal landscape in the lower courts as of 2003 indicates that the underlying principle for *Padilla*'s misadvice holding—that an attorney's misrepresentation, even on a collateral matter, may constitute ineffective assistance—was so embedded in the fabric of the Sixth Amendment framework that all reasonable jurists would have agreed that *Strickland* applied to misadvice claims on deportation consequences.

Castro–Taveras, 841 F.3d at 51 (internal citations omitted). The court also noted that a reasonable expectation that defense counsel not misadvise a client regarding immigration consequence may implicate Fifth Amendment concerns about the voluntariness of a defendant's guilty plea. *See id.* at 51 n.14.

The *Castro–Taveras* Court ultimately held that *Padilla*'s misadvice holding did not constitute a new rule and did not bar applicant's claim for post-conviction relief. *Id.* at 51. It vacated the district court's summary denial of relief and remanded for an evidentiary hearing. *Id.* at 54. Two other federal circuits have reached the same conclusion. *See U.S. v. Chan*, 792 F.3d 1151 (9th Cir. 2015); *Kovacs v. U.S.*, 744 F.3d 44 (2nd Cir. 2014).

ii. Holding of Ex parte Aguilar Inconsequential to Appellee

The issue framed by the Court in *Ex parte Aguilar* is indicative of the reach of *Ex parte Aguilar:* "notwithstanding *Padilla*, whether a defendant's guilty or no contest plea will be rendered involuntary if counsel affirmatively misadvises a defendant about the immigration consequences of his plea." *Ex parte Aguilar,* WR-82,014-01, 2016 Tex. Crim. App. Unpub. LEXIS 323, at *2 (Tex. Crim. App. Apr. 6, 2016). The issue was framed as such as a result of the fact that the Court was tasked with determining whether Aguilar's loss of temporary protected status equated with the consequence of removal as in *Padilla*. *Id.* This Court held that affirmative misadvice regarding a plea to removable offenses that have an impact upon a person's legal status, falls within the ambit of *Padilla*. *Id.* At *4-5, 15. This Court essentially categorized *Ex parte Aguilar* as an extension of *Padilla* but did not distinguish between affirmative misadvice and non-advice. *Id.*

> *"We extend Padilla to the circumstances where a defendant's guilty plea causes him to automatically lose legal immigration status and become*

> *removable. Aguilar's guilty plea, which was based on his counsel's incorrect advice, will cause him to lose his temporary protected status and render him removal. Because Aguilar has shown he would not have pleaded guilty if he had been correctly advised of the relevant immigration consequences, we hold that ineffective assistance of counsel rendered his plea involuntary and vacate his plea." Id.*

As such, the State's argument that *Ex parte Aguilar* implicitly distinguished between two classes of immigration consequences claims: (1) no deportation advice *Padilla* claims; and (2) "affirmative loss-of-protected-status-misadvice claims," is unfounded. *Ex parte Aguilar* did not take the time to analyze failure to advise versus affirmative loss-of-protected-status-misadvice claims. Instead, *Ex parte Aguilar* was only concerned with whether loss of legal status and likelihood of become deported, was within the ambit of *Padilla.* In other words, the Court was more interested in the type of damage that resulted from the incorrect advice given by defense counsel; it was not worried about the dichotomy between failure to advise and affirmative misadvice.

Most recently in *Lee v. United States,* the magistrate court wrote:

> The "new rule" identified by the Court in *Chaidez* as having been announced in *Padilla* is one that speaks to the attorney's obligation to act (specifically, to advise). However, if, as Lee suggests, there was a rule in place at the time of his conviction that spoke not to the obligation to act, but rather to the obligation to, once choosing to act, do so competently by rendering accurate advice then, according to the Court's opinion in *Chaidez*, that rule is "separate" from and undisturbed by the *Padilla* rule. Such a "separate rule" lives in harmony with a pre-*Padilla* and post-*Padilla* world. Now, instead of limiting ineffective-

> assistance claims in this context to cases of affirmative misadvice, courts post-*Padilla* recognize such claims based on failure to advise as well. Thus, to the extent Lee's claim relies on a "separate rule" for affirmative misadvice in place at the time of his conviction, the fact that *Padilla* is not retroactive is inconsequential to Lee's case.

U.S. v. Lee, Civ. No. 10–02698–JTF–dkv, Crim. No. 09-20011, 2013 WL 8116841, at *8 (W.D. Tenn. Aug. 6, 2013), *adopted in part and rejected in part by* 2014 WL 1260388, at *3 (W.D. Tenn. Mar. 20, 2014). As in *Lee*, Appellee's claim herein pre-dated failure to advise cases such as *Padilla*, and was governed by principles existing at the time of Appellee's plea related to the rendering of incorrect advice.

Most importantly, the 13th Court of Appeals adopted the trial court's findings of fact and conclusions of law, which among other things found:

> "13. If Applicant had not been affirmatively misadvised, he would not have pled guilty. The Applicant would have requested a jury trial. Thus, but for Former Counsel's but for Former Counsel's affirmative misadvise [sic] that Applicant would be "okay" and the "the charge would probably not result in deportation," the Applicant would have pled not guilty."

By way of the findings of fact and conclusions of law, Appellee has established the second prong of *Strickland v. Washington*, such that the issue of prejudice is nonexistent in this case.

II. AFFIRMATIVE MISADVICE CLAIMS PERMITTED

This Court time and again has made rulings vacating criminal convictions on the basis of affirmative misadvice as it relates to many matters without regard to whether such consequences are direct/collateral. No pre-*Padilla* case in Texas has

made a claim for ineffective assistance of counsel in the context of affirmative misadvice relating to immigration consequences. This Court has never ruled that claims of ineffective assistance of counsel based on affirmative misadvice relating to immigration consequences, are not cognizable.

In spite of the lack of precedent from this Court, Appellee's claim for relief is grounded in the federal constitution. *See* U.S. Const. amend. VI (rights to jury and counsel). The ultimate authority on federal constitutional law is the U.S. Supreme Court. *See* U.S. Const. art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. 137, 177-78, 2 L. Ed. 60 (1803); *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999); *State v. Guzman*, 959 S.W.2d 631, 633 (Tex. Crim. App. 1998). The Supreme Court's holdings about federal constitutional law and its application are binding on this Court. *See Ex parte Ramey*, 382 S.W.3d 396, 397 (Tex. Crim. App. 2012); *Coronado v. State*, 351 S.W.3d 315, 317 (Tex. Crim. App. 2011); *Coble v. State*, 330 S.W.3d 253, 270 (Tex. Crim. App. 2010). Thus, the validity of Appellee's claim must be judged in accordance with applicable U.S. Supreme Court precedent.

a. Direct / Collateral Consequences Irrelevant Under Affirmative Misadvice Cases

The State argues that immigration consequences are collateral matters and that therefore "misadvice" regarding deportation was inconsequential to determining whether a plea was entered into voluntarily. The State specifically relies on *Brady v. United States*, 397 U.S. 742, 755 (1970), and posits that a plea is voluntary in spite

of "misadvice" regarding immigration consequences since same was considered a collateral matter. This interpretation of *Brady* is plainly incorrect, as it encompasses failure to advice claims, not affirmative misadvice claims. *Ex parte Morrow,* 952 S.W.2d 530, 536 (Tex. Crim. App. 1997), is another case cited by the State which held that counsel was not ineffective for failing to advise about "adverse consequences" that his guilty pleas would have in the event of a reversal and retrial. *Ex parte Morrow* is a failure to advise case not an affirmative misadvice case and therefore fails to fit within the ambit of Appellee's claims.

This Court held that admonishments about deportation consequences were not constitutionally required in *Carranza,* 980 S.W.2d at 656 and in *State v. Jimenez,* 987 S.W.2d 886, 889 (Tex. Crim. App. 1999). These holdings, however, do not translate to mean that this Court would never have ruled that affirmative misadvice regarding immigration consequences prior to *Padilla*, would rise to ineffective assistance of counsel pursuant to *Strickland v. Washington.* The State attempts to establish that because deportation was considered a collateral consequence to a plea, no deference should be given to Appellee's argument of ineffective assistance of counsel based on affirmative misadvice. However, the Supreme Court in *Padilla* noted that it had never applied a distinction between direct and collateral consequences to define the scope of constitutionality 'reasonable professional assistance' required under *Strickland. See Padilla v. Kentucky*¸ 559 U.S. at 356, 359

(2010). The Court concluded, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amended right to counsel." *Id.* At 366. In other words, "*Strickland* applie[d] to [the applicant's] claim." *Id.*

i. Federal Precedent Confirms Affirmative Misadvice Ground for Ineffective Assistance of Counsel Claims Notwithstanding Direct/Collateral Consequences Dichotomy

The distinction between direct/collateral consequences is irrelevant when defense counsel has provided a defendant with affirmative misadvice. Appellee concedes and acknowledges that no duty to advise regarding immigration consequences existed at the time of Appellee's plea of guilty. That is, there was no obligation to act, but rather an obligation that once counsel chose to act, counsel was tasked with the responsibility of doing so competently, as discussed in *Lee v. United States.*[2]

As of 2003, two federal circuits had held that misadvice on deportation consequences can give rise to an ineffective assistance of counsel claim. *See Couto*, 311 F.3d at 188; *Downs-Morgan*, 765 F.2d at 1540-41; **cf. *Santos-Sanchez v. United States*, 548 F.3d 327, 332-36 (5th Cir. 2008) (analyzing an affirmative misrepresentation claim separately from a failure-to-advise-claim, applying the**

[2] *See U.S. v. Lee*, Civ. No. 10–02698–JTF–dkv, Crim. No. 09-20011, 2013 WL 8116841, at *8 (W.D. Tenn. Aug. 6, 2013), *adopted in part and rejected in part by* 2014 WL 1260388, at *3 (W.D. Tenn. Mar. 20, 2014).

collateral-direct distinction only as to the non-advice argument, while rejecting the assertion that there was any misrepresentation by counsel).

Several federal district courts also had recognized that principle. *See United States v. Khalaf*, 116 F. Supp. 2d 210, 214 (D. Mass. 1999) (recognizing that "counsel's affirmative misrepresentation [regarding deportation consequences] in response to a specific inquiry from the defendant may, under certain circumstances, constitute ineffective assistance of counsel"); *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995) ("[C]ounsel's affirmative misrepresentation regarding the deportation consequences of a guilty plea may, but does not automatically, constitute ineffective assistance."); see also *Acevedo-Carmona v. Walter*, 170 F. Supp. 2d 820, 825-26 (N.D. Ill. 2001) (stating that, where defendant's counsel "gave him allegedly erroneous advice regarding deportation [**37] and earned good conduct credits," "[w]e do not necessarily agree . . . that Acevedo's counsel performed reasonably," but finding no prejudice "as is required by the second Strickland prong").

Additionally, at least six federal circuits recognized before 2003 that misadvice on other collateral matters besides immigration consequences -- e.g., parole eligibility -- is (or may be) subject to *Strickland*. *See Beavers v. Saffle*, 216 F.3d 918, 925 (10th Cir. 2000) ("[A]ttorney advice which misrepresents the date of parole eligibility by several years can be objectively unreasonable."); *Meyers v.*

Gillis, 142 F.3d 664, 666 (3d Cir. 1998) (recognizing that "a defendant may be entitled to habeas relief if counsel provides parole eligibility information that proves to be grossly erroneous"); *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel."); *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. [*50] 1990) (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under [*Strickland*]."); *Czere v. Butler*, 833 F.2d 59, 63 n.6 (5th Cir. 1987) ("Even if the Sixth Amendment does not impose on counsel an affirmative obligation to inform clients of the parole consequences of their pleas, . . . other courts have recognized a distinction between failure to inform and giving misinformation[.]"); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) ("[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.").

Similarly, although not binding on this Court, the D.C. Circuit recognized before 2003 that, if a prosecutor misleads a defendant about the risk of deportation, rather than simply fails to inform him, the collateral-direct distinction does not bar the defendant from withdrawing his plead based on involuntariness. *See Briscoe v. United States*, 432 F.2d 1351, 1353, 139 U.S. App. D.C. 289 (D.C. Cir. 1970)

("under appropriate circumstances the fact that a defendant has been misled as to consequence of deportability may render his plea subject to attack."); accord *United States v. Russell*, 686 F.2d 35, 41, 222 U.S. App. D.C. 313 (D.C. Cir. 1982). As such, an affirmative misrepresentation regarding a consequence of a plea, irrelevant of whether such matter is a direct or collateral consequence, has always been cognizable via habeas.

ii. Affirmative Misadvice Cases Cognizable Under Texas Law Notwithstanding Direct/Collateral Consequences Dichotomy

Texas jurisprudence has shown that misinformation – even regarding a matter about which the defendant is not entitled to be informed will render a plea involuntary if the defendant shows that the plea was actually induced by the misinformation. For instance, this Court previously held in both *Ex parte Moussazadeh* from 2012 (parole eligibility) and *Ex parte Moody* from 1999 (serving state and federal sentences concurrently), that "erroneous advice" or "misadvice" rendered the defendants' pleas involuntary. *Ex parte Moody,* 991 S.W.2d 856, 858-59 (Tex.Crim.App. 1999); *Ex parte Moussazadeh,* 361 S.W.3d 684, 691-92 (Tex. Crim. App. 2012); also see *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991) (probation eligibility); *Ex parte Griffin*, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984) (plea bargain also resolved a prior case).

In *Ex parte Champion*, No. WR-86,333-01, 2017 Tex. Crim. App. Unpub. LEXIS 128, at *2 (Crim. App. Feb. 15, 2017), the Court said:

> *"The trial court has determined that Applicant relied on the erroneous advice regarding parole eligibility, and that he would not have agreed to plead guilty had he known that the offense to which he was pleading guilty would be treated as an "aggravated" offense for parole eligibility purposes even though the deadly weapon allegation had been abandoned. Applicant is entitled to relief." Ex parte Moussazadeh, 361 S.W.3d 684, 692 (Tex. Crim. App. 2012).*

Then, in *Ex parte Evans*, No. WR-83,873-02, 2017 Tex. Crim. App. LEXIS 892, at *1-2 (Crim. App. Sep. 20, 2017), the Applicant claimed that his plea was involuntary because his attorney misadvised him about the effect of a deadly weapon finding on his parole eligibility. The Applicant claimed that he would have insisted on going to trial if he had been correctly advised. *Id.* The habeas Court found the claims to be true and granted relief. The Court held that the law as it existed when Applicant's conviction became final entitled him to relief. *Id.*

More importantly, Judge Yeary's concurring opinion in *Ex parte Aguilar* correctly notes that in 1984, the Court in *Ex Parte Griffin*, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984), stated that it had previously reversed convictions and granted habeas corpus relief when defense counsel gives "inaccurate advice" regarding the consequences of a guilty plea. *See Ex parte Aguilar*, 2017 Tex. Crim. App. LEXIS 894 (Yeary, J., concurring), at *20.

The above-referenced case law clearly establishes that affirmative misadvice cases have existed in federal and Texas jurisprudence for decades. There is a clear dichotomy between failure to advise cases and affirmative misadvice cases. Courts

have swiftly granted relief in affirmative misadvice cases, notwithstanding the context of the misadvice and / or whether the consequence is considered direct or collateral. In light of the fact that Appellee's claims related to affirmative misadvice by his counsel, rather than a failure to inform, the collateral-direct distinction is irrelevant such that Appellee's claims are cognizable.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee Samuel Osvaldo Garcia prays the court of appeals' decision be affirmed. Appellee is entitled to habeas relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 4,416 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ *Rafael de la Garza, III*
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Appellee was served in compliance with Tex.R.App.P. 9.5 on this 27th day of December 2017, to the following attorney of record for Appellant, The State of Texas, by email:

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